AMICI BRIEFS

Supreme Court, U.S.
FILED
NOV 11 2015
OFFICE OF THE CLERK

No. 15-457

IN THE

Supreme Court of the United States

MICROSOFT CORPORATION,

Petitioner,

v.

SETH BAKER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

CORY L. ANDREWS
Counsel of Record
MARK S. CHENOWETH
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
candrews@wlf.org

November 11, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether a federal court of appeals has jurisdiction to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice.

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 6

REASONS FOR GRANTING THE PETITION 8

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW UNDERMINES THIS COURT'S UNANIMOUS HOLDING IN *LIVESAY* 8

A. The Ninth Circuit's Holding Contravenes *Livesay*'s Policy Against Piecemeal Appeals 10

B. The Ninth Circuit's Holding Improperly Favors Plaintiffs over Defendants 11

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW EXACERBATES AN EXISTING CIRCUIT SPLIT ON THE QUESTION PRESENTED 12

A. A Clear Majority of the Circuits to Consider the Question Squarely Reject the Ninth Circuit's Approach 12

B. Further Percolation Is Especially Unwarranted Given the Severe Disruption the Panel's Decision Is Already Causing 17

III. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S HOLDING RAISES IMPORTANT, RECURRING QUESTIONS OF FEDERAL LAW 18

A. The Ninth Circuit's Expansive Reading of § 1291 Is Inconsistent with the Proper Understanding of the Statute 18

B. The Ninth Circuit's Holding is Inconsistent with a Plain Reading of Rule 23(f) 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Berger v. Home Depot USA, Inc.,
741 F.3d 1061 (9th Cir. 2014) 5, 6

Bobbitt v. Milberg,
801 F.3d 1066 (9th Cir. 2015) 17

Bowe v. First of Denver Mortg. Investors,
613 F.2d 798 (10th Cir. 1980) 13

Camesi v. Univ. of Pittsburgh Med. Ctr.,
729 F.3d 239 (3d Cir. 2013) 15

Campbell-Ewald Co. v. Gomez,
No. 14-857 (U.S., dec. pending) 1

Chavez v. Illinois State Police,
251 F.3d 612 (7th Cir. 2001) 14

Clapper v. Amnesty Int'l,
133 S. Ct. 1138 (2013) 1

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) ..... *passim*

Dart Cherokee Basin Operating Co. v. Owens,
135 S. Ct. 547 (2014) 1

Druhan v. Am. Mut. Life,
166 F.3d 1324 (11th Cir. 1999) 14

Page(s)

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 2

Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
903 F.2d 176 (2d Cir. 1990), *cert. denied*,
498 U.S. 1025 (1991) 16

Goodyear Dunlop Tires Operations, S.A. v. Brown,
131 S. Ct. 2846 (2011) 1

Henson v. Fid. Nat'l Fin., Inc.,
No. 14-56578 (9th Cir., dec. pending) 17

Himler v. Comprehensive Care Corp.,
993 F. 2d 1537 (4th Cir. 1993) 15

Marshall v. Sielaff,
492 F.2d 917 (3d Cir. 1974) 11, 16

Rhodes v. E.I. Du Pont de Nemours & Co.,
636 F.3d 88 (4th Cir. 2011), *cert. denied*,
132 S. Ct. 499 (2011) 15

Sayre v. The Musicland Grp., Inc.,
850 F.2d 350 (8th Cir. 1988) 22

Shannon v. Gen. Elec. Co.,
186 F.3d 186 (2d Cir. 1999) 17

Smith v. Microsoft Corp.,
No. 14-55807 (9th Cir., dec. pending) 18

Page(s)

Spokeo, Inc. v. Robins,
No. 13-1339 (U.S., dec. pending) 1

Standard Fire Ins. Co. v. Knowles,
133 S. Ct. 1345 (2013) 1

Strafford v. Eli Lilly & Co.,
No. 2:12-cv-09366-SVW-MAN (C.D. Cal., dec. pending) 18

Sullivan v. Pac. Indem. Co., 566 F.2d 444
(3d Cir. 1977) 11, 16

Will v. Hallock,
546 U.S. 345 (2006) 9

Woodward v. STP Corp.,
170 F.3d 1043 (11th Cir. 1999) 13, 14

RULES

Fed. R. Civ. P. 23 3

Fed. R. Civ. P. 23(f) 3, 4, 8, 20, 21, 22

Sup. Ct. R. 37.2(a) 1

Sup. Ct. R. 37.6 1

STATUTES

28 U.S.C. § 1291 ..... *passim*

28 U.S.C. § 2072(c) 20

Page(s)

OTHER AUTHORITIES

Advisory Committee Notes Accompanying 1998 Amendments to Rule 23, Federal Rules of Civil Procedure 20

Erwin Chemerinksy & Barry Friedman, *Federal Judicial Independence Symposium: The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757 (1995) 22

INTERESTS OF *AMICI CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has frequently appeared in this and other federal courts in cases that examine limitations on the power of federal courts to exercise either subject matter or personal jurisdiction over parties and proceedings. *See, e.g., Spokeo, Inc. v. Robins*, No. 13-1339 (U.S., dec. pending); *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138 (2013); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011). WLF has also appeared before this Court as an *amicus* to oppose procedural gamesmanship by the plaintiffs' bar. *See, e.g., Campbell-Ewald Co. v. Gomez*, No. 14-857 (U.S., dec. pending); *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014); *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013).

The National Association of Manufacturers (NAM) is the largest manufacturing association in

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), more than 10 days prior to the due date for this brief, counsel for *amici* notified counsel of record for all parties of *amici*'s intention to file. All parties to this dispute have consented to the filing of this brief, and letters of consent have been lodged with the Court.

the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system.

Amici strongly support faithful adherence to the jurisdictional statutes Congress enacted to prevent multiple, piecemeal appeals from a single district court proceeding. By strictly limiting the occasions in which a party may appeal an adverse ruling, those federal appellate rules "prevent[] the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

Amici are concerned that the decision below, if allowed to stand, will seriously undermine judicial administration by effectively providing plaintiffs an

absolute right to immediate review of a district court order denying a motion to certify a plaintiff class under Rule 23. Indeed, the decision could well result in numerous appeals from a single action. Affording appeals-as-of-right to unsuccessful class-certification movants is not only contrary to 28 U.S.C. § 1291, which manifests Congress's longstanding policy against multiple, piecemeal appeals, but it also undermines Rule 23(f), which permits immediate appeals from class certification orders to proceed at the sole discretion of the appeals court.

STATEMENT OF THE CASE

The petition presents a question of exceptional importance regarding the subject-matter jurisdiction of the federal appeals courts. Congress has granted the courts of appeals "jurisdiction of appeals from all final decisions of the district courts of the United States," subject to limited exceptions. 28 U.S.C. § 1291. At issue here is whether §1291 provided the Ninth Circuit with appellate jurisdiction to review the district court's order striking respondents' class allegations from the complaint.

Petitioner Microsoft Corporation (Microsoft) is a leading technology company that develops, manufactures, and sells (among other things) the Xbox 360 video game console. Respondents are five individuals who, in 2011, brought a putative class-action lawsuit against Microsoft alleging defective design of the Xbox 360 and requesting certification of a nationwide class of all similarly situated

purchasers.[2]

On March 27, 2012, on petitioner's motion, the U.S. District Court for the Western District of Washington struck respondents' class allegations from the complaint on the basis that causation and damages could not be proven in one stroke by common evidence. Invoking Rule 23(f), respondents sought an interlocutory appeal of the district court's order from the Ninth Circuit. Exercising its discretion to grant or deny such petitions, the Ninth Circuit denied appellate review and remanded the case back to the district court for individualized proceedings on the merits. Pet. App. 10a.

Rather than pursue their individual claims, respondents moved on remand to voluntarily dismiss their claims with prejudice, declaring their intention to appeal the district court's order striking the complaint's class allegations. Pet. App. 36a. Although Microsoft agreed to the district court's dismissal of respondents' claims with prejudice, it also maintained that respondents had no right to appeal the court's striking of class allegations following the voluntary dismissal. *Ibid.* Microsoft argued that the appeals court lacked jurisdiction to hear such an appeal because the order striking class

---

[2] In 2007, the same lawyers representing respondents in this case brought a nearly identical class action against Microsoft, also in the Western District of Washington. *See* Pet. App. 6a-8a. When the district court denied class certification, those plaintiffs unsuccessfully petitioned the Ninth Circuit for interlocutory appeal under Rule23(f). When the Ninth Circuit denied the petition, the plaintiffs agreed to resolve their individual claims with Microsoft.

allegations was not a "final decision" of the district court within the meaning of § 1291. "[R]eserving to all parties their arguments as to the propriety of any appeal," the district court dismissed respondents' claims with prejudice. *Id.* at 36a-37a.

Exercising jurisdiction over respondents' appeal, the Ninth Circuit reversed. The panel rejected Microsoft's jurisdictional argument solely on the basis of *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061 (9th Cir. 2014), a decision handed down after the appeal in the instant case was fully briefed. Pet. App. 11a-12a. The panel did not address Microsoft's contention that the order striking class allegations was not a "final decision" within the meaning of § 1291. Instead, the panel determined that the only relevant issue under § 1291 was whether respondents' voluntary dismissal of their claims deprived their appeal of the requisite "adversity." *Ibid.*

The panel concluded that respondents possessed sufficient adversity to warrant exercise of appellate jurisdiction, noting that *Berger* had rejected just such an absence-of-adversity contention:

> [*Berger*] distinguished a stipulated dismissal without a settlement from a stipulated dismissal with a settlement. The former retains sufficient adversity to sustain an appeal. The latter does not. As this case did not involve settlement, *Berger* establishes that "[we] have jurisdiction under 28 U.S.C. § 1291 because a dismissal of an action

> with prejudice, even when such dismissal is the product of a stipulation, is a sufficiently adverse—and thus appealable—final decision."

Pet. App. 12a (quoting *Berger*, 741 F.3d at 1064, 1065).

Turning to the availability of a class action, the panel concluded that the district court abused its discretion in striking the class allegations from the complaint. Pet. App. 19a. At the same time, the panel expressed no opinion "on whether the specific common issues identified in this case are amenable to adjudication by way of a class action, or whether plaintiffs should prevail on a motion for class certification." *Ibid.* Nor did the panel even attempt to address how the district court should proceed in the absence of any putative class representative with a live claim—each of the five respondents having voluntarily dismissed his individual claims with prejudice. The panel reversed the district court's order and remanded for further proceedings consistent with its opinion.

Microsoft's petition for rehearing en banc was denied. Pet. App. 5a.

SUMMARY OF ARGUMENT

The panel below held that a district court's adverse class determination becomes an immediately appealable, final order when the district court dismisses the action with prejudice—even when such dismissal is the product of a stipulation by the plaintiffs. That holding is inconsistent with this Court's decision in *Coopers & Lybrand v. Livesay*,

437 U.S. 463, 475 (1978), which held that allowing a plaintiff to appeal a class certification denial immediately as of right, rather than from a final judgment after trial, violates Congress's longstanding policy against multiple, piecemeal appeals. Such appeals are impermissible, the Court held, even when the denial of class certification tolls the "death knell" for the plaintiffs' case.

The decision below also directly conflicts with the decisions of at least five other federal courts of appeals—the Third, Fourth, Seventh, Tenth, and Eleventh Circuits. The panel's holding joins the Second Circuit in expanding a longstanding conflict in the courts of appeals concerning whether, and under what circumstances, a putative class plaintiff can ever appeal an adverse class-certification order by simply voluntarily dismissing his individual claims with prejudice. This well-recognized conflict among the lower courts requires this Court's intervention.

Review is also warranted because the Ninth Circuit's decision raises important, recurring questions of federal law. Indeed, the panel's expansive reading of 28 U.S.C. § 1291 is inconsistent with the proper understanding of that statute. As this Court has recognized, Congress adopted § 1291's "final decision" rule to ensure that controversies are not reviewed by appellate courts in a piecemeal fashion. The panel decision thus undermines § 1291 by permitting, and thus encouraging, piecemeal appeals. It also creates unfairness by effectively granting plaintiffs—but *not* defendants—an absolute right to immediate review of adverse class-certification orders.

As a result of the panel's deeply flawed decision below, plaintiffs effectively will get *at least* two (rather than one) appeals from adverse class certification rulings, thereby multiplying their chances of encountering a sympathetic panel. But such a result contravenes Federal Rule of Civil Procedure 23(f), which grants both plaintiffs and defendants the right to *request* interlocutory review of class-certification orders but provides appeals courts unreviewable discretion to deny the request. The entire purpose of the Federal Rules of Civil Procedure is to provide a uniform and orderly process of adjudicating cases in the federal system, but only this Court can now provide a single, uniform standard for the application of Rule 23(f).

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW UNDERMINES THIS COURT'S UNANIMOUS HOLDING IN *LIVESAY*

Given this Court's unanimous holding in *Coopers & Lybrand v. Livesay*, which held that orders concerning class certification are not appealable final orders under 28 U.S.C. § 1291, the holding below creates an anomaly by affording greater opportunity for plaintiffs than defendants to obtain judicial review of an adverse class certification determination. Inviting such an untoward result undermines this Court's clear precedent and does violence to the entrenched policy opposing piecemeal review. That "finality" rule, which derives from the Judiciary Act of 1791, promotes judicial efficiency and deters "the harassment and cost of a succession of separate appeals from the various rulings to which a litigation

may give rise." *Will v. Hallock*, 546 U.S. 345, 350 (2006) (internal quotations omitted).

In *Livesay*, the Court examined and rejected the "death knell" doctrine, under which several courts of appeals had exercised jurisdiction over appeals from district court orders that did not resolve all issues in the case. *See* 437 U.S. at 475. Under that doctrine, when deciding whether to exercise appellate jurisdiction, some appeals courts examined the impact of the district court order on the individual case. If those courts concluded that the costs of trying the individual's case so exceeded the potential judgment (considering the plaintiff's resources) that further pursuit of the plaintiff's claim was improbable, the order was deemed a "final decision" and thus subject to appeals court jurisdiction under § 1291.

In rejecting the "death knell" doctrine as a basis for permitting appeals from orders denying class certification, the Court explained that Congress adopted § 1291's "final decision" rule to ensure that controversies are not reviewed by appellate courts in a piecemeal fashion. 437 U.S. at 473. Recognizing the potential for abusive appeals, the Court concluded that the doctrine "would have a serious debilitating effect on the administration of justice" by permitting "multiple appeals" within a single case. *Id.* at 473-74. Most relevant here, the Court was critical of the fact that "the doctrine operates only in favor of plaintiffs even though the class issue—whether to certify, and if so, how large the class should be—will often be of critical importance to defendants as well." *Id.* at 476.

A. The Ninth Circuit's Holding Contravenes *Livesay*'s Policy Against Piecemeal Appeals

Congress's longstanding policy against piecemeal appeals, which drove the *Livesay* Court's construction of § 1291 in the context of class-certification appeals filed *before* entry of a final judgment, applies with equal force in the context of class-certification appeals filed *after* a dismissal with prejudice that results from the plaintiffs' refusal to proceed to trial. As a practical matter, if § 1291 were interpreted to permit a plaintiff to obtain immediate review of every adverse class determination order by procuring a dismissal with prejudice, it would render the venerable policy against piecemeal litigation and appeals a dead letter.

It is impossible to overstate the mischief that the Ninth Circuit's novel approach to appellate jurisdiction would foment if left undisturbed. As the Third Circuit has warned in a very similar context:

> If a litigant could refuse to proceed whenever a trial judge ruled against him, wait for the court to enter a dismissal for failure to prosecute, and then obtain review of the judge's interlocutory decision, the policy against piecemeal litigation and review would be severely weakened. This procedural technique would in effect provide a means to avoid the finality rule embodied in 28 U.S.C. § 1291. To review the district court's [order] ... under the facts of this case is to invite

> the inundation of appellate dockets with requests for review of interlocutory orders and to undermine the ability of trial judges to achieve the orderly and expeditious disposition of cases.

Sullivan v. Pac. Indem. Co., 566 F.2d 444, 445-46 (3d Cir. 1977) (citing *Marshall v. Sielaff*, 492 F.2d 917, 919 (3d Cir. 1974)).

Here, as in *Livesay*, allowing appeals of right from "orders that turn on the facts of a particular case thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule—'that of maintaining the appropriate relationship between the respective courts.'" *Ibid.* Absent this Court's review of the misguided decision below, that "vital purpose" will be abandoned entirely.

B. The Ninth Circuit's Holding Improperly Favors Plaintiffs over Defendants

By adopting a one-sided rule that favors plaintiffs over defendants, the panel decision conflicts with *Livesay*, which cautioned that rules governing appellate review ought to treat plaintiffs and defendants even-handedly. *Livesay*, 437 U.S. at 476 (rejecting "death knell" doctrine in part because "the doctrine operates only in favor of plaintiffs"). A decision to certify a class can just as readily sound the death knell of a class-action defense. After all, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to

settle and to abandon a meritorious defense. Yet the Courts of Appeals have correctly concluded that orders granting class certification are interlocutory." *Ibid.* Even so, the panel below created a pathway for plaintiffs by which they can always obtain pre-trial appellate review of class-certification orders while not creating a similar pathway for defendants.

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW EXACERBATES AN EXISTING CIRCUIT SPLIT ON THE QUESTION PRESENTED

The circuit split presented here is real and pronounced, reflecting a clear and significant division of judicial authority on an important question of federal law. At least five federal circuits—the Third, Fourth, Seventh, Tenth, and Eleventh Circuits—have all held that an appeals court lacks jurisdiction to review a denial of class certification where the plaintiffs have caused their claims to be dismissed with prejudice. In contrast, both the Second and Ninth Circuits have held that a plaintiff's voluntary dismissal with prejudice creates a "sufficiently adverse" final decision from which to appeal an earlier class-certification denial.

A. A Clear Majority of the Circuits to Consider the Question Squarely Reject the Ninth Circuit's Approach

The panel below held that a district court's adverse class determination becomes an immediately appealable, final order when the district court dismisses the action with prejudice—even when such dismissal is the product of a stipulation by the

plaintiffs. That approach to the federal courts' appellate jurisdiction has been roundly rejected by at least five other circuits. Only this Court can now resolve the impasse among the courts of appeals.

In *Bowe v. First of Denver Mortg. Investors*, 613 F.2d 798, 801 (10th Cir. 1980), for example, the named plaintiff unsuccessfully sought class certification but then failed to prosecute her individual claims. When the district court ultimately dismissed the suit for lack of prosecution, the plaintiff contended on appeal that the dismissal constituted a final judgment entitling her to appellate review of the trial court's denial of class certification. *Ibid.*

The Tenth Circuit disagreed. Recognizing that this Court's decision in *Livesay* "does not tolerate creation of a loophole by the simple device of allowing the claim of a class representative to be dismissed for lack of prosecution," the appeals court concluded that review of the judgment "does not allow review of the order denying certification of the class." 613 F.2d at 801-02. Nor did the fact that "[t]he 'death knell' has indeed sounded" constitute "a genuine distinction between this case and *Livesay*." *Id.* at 802. As a result, the Tenth Circuit held that any appeal of the class issue was "interlocutory notwithstanding that the individual case of the class representative stands dismissed." *Id.*

Similarly, the Eleventh Circuit has held that it lacks jurisdiction over an appeal from a district court order vacating a state court's conditional class certification and refusing to remand the case back to state court. *Woodward v. STP Corp.*, 170 F.3d 1043

(11th Cir. 1999). In that case, the plaintiff filed a motion for certification in the district court, but then filed a motion for voluntary dismissal prior to obtaining a ruling on the motion for certification. 170 F.3d at 1044 n.2. The appeals court reasoned that because the named plaintiff did not obtain district court certification, he could not appeal directly from the order denying remand. *Id.* at 1044. And the order dismissing the case with prejudice was not appealable, the court concluded, "because it was obtained at the request of the plaintiff." *Ibid.*[3]

In *Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001), a putative class of minority motorists filed suit against the Illinois State Police for alleged violations of their civil rights during traffic stops. When the district court declined to certify the class or to permit a new plaintiff to be added, the plaintiffs voluntarily dismissed their remaining claims, with prejudice. 251 F.3d at 627. On appeal, plaintiffs sought review of (among other things) the district court's denial of class certification of the claims they had voluntarily dismissed. *Id.* at 628-29. The Seventh Circuit held that it was without jurisdiction to "review claims that were dismissed pursuant to plaintiffs' request for voluntary dismissal with prejudice." *Ibid.*

---

[3] In fact, the Eleventh Circuit has categorically refused to exercise appellate jurisdiction over *any* "appeal from a final judgment that resulted from a voluntary dismissal with prejudice." *Druhan v. Am. Mut. Life*, 166 F.3d 1324, 1325-26 (11th Cir. 1999) (dismissing appeal for want of jurisdiction because "[t]he dismissal with prejudice was requested only as a means of establishing finality in the case such that the plaintiff could appeal [an] interlocutory order—an order that the plaintiff believes effectively disposed of her case").

The Fourth Circuit requires the same result. In *Rhodes v. E.I. Du Pont de Nemours & Co.*, 636 F.3d 88 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 499 (2011), after the district court denied plaintiffs' motion for class certification of their medical monitoring claims, plaintiffs filed a stipulation of voluntary dismissal of those individual claims. 636 F.3d at 93-94. On appeal, the Fourth Circuit held that "when a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification, as happened in this case, there is no longer a 'self-interested party' advocating for class treatment." *Id.* at 100. As a result, the appeals court held that it lacked jurisdiction to decide whether the district court had erred in denying class certification. *Ibid*; *see also Himler v. Comprehensive Care Corp.*, 993 F. 2d 1537 (4th Cir. 1993) (dismissing the appeal because the order denying class certification "had no effect on the merits of, nor imposed any legal impediment on, the underlying individual claims").

And in *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F.3d 239, 245-47 (3d Cir. 2013), the Third Circuit likewise refused to allow plaintiffs' "impermissible attempt to manufacture finality" under 28 U.S.C. § 1291. In that case, the named plaintiffs voluntarily dismissed their individual claims with prejudice but sought to pursue an appeal on behalf of others who had opted into the litigation. 729 F.3d at 247. In dismissing the appeal for lack of an appealable order, the Third Circuit rejected the plaintiffs' attempt "to convert an interlocutory order into a final appealable order by obtaining dismissal." *Id.* at 245. "If we were to allow such a procedural sleight-of-hand to bring about finality here," the

appeals court concluded, "there is nothing to prevent litigants from employing such a tactic to obtain review of discovery orders, evidentiary rulings, or any of the myriad decisions a district court makes before it reaches the merits of an action." *Id.* at 245-46; *see also Sullivan*, 566 F.2d at 445-46 (quoting *Marshall*, 492 F.2d at 919).

The reasoned approach taken by the Third, Fourth, Seventh, Tenth, and Eleventh Circuits stands in direct conflict with the Ninth Circuit's decision below, and with the Second Circuit, which has similarly permitted a putative class plaintiff to obtain appellate review of a class-certification denial by failing to prosecute its individual claims, resulting in dismissal with prejudice.

In *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 78-79 (2d Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991), the district court denied plaintiff's request for class certification and ultimately dismissed the complaint with prejudice, for failure to prosecute. When the plaintiff appealed the district court's class certification decision, the Second Circuit exercised jurisdiction on the basis that "immediate appellate review will only be available to disappointed class representatives who risk forfeiting their potentially meritorious individual claims, [so] reviewing the merits of the class certification order will not substantially undermine the policy against piecemeal review." 903 F.2d at 179.[4]

---

[4] While sitting on the U.S. Court of Appeals, then-Judge Sotomayor expressly acknowledged that the Second Circuit's

These conflicting appeals court decisions, which arrive at starkly divergent conclusions about the scope of a federal appeals court's jurisdiction, demonstrate the recurring importance of the question presented by the petition. Given the entrenched split among a majority of the circuits, it would be a mistake to allow this question to percolate any further before deciding to resolve it.

B. Further Percolation Is Especially Unwarranted Given the Severe Disruption the Panel's Decision Is Already Causing

Further percolation is especially unwarranted because the panel's expansive reading of 28 U.S.C. § 1291 is *already* having severe repercussions. Indeed, plaintiffs within the Ninth Circuit have already begun relying on the panel's decision to seek (and even obtain) review after securing a voluntary dismissal. *See, e.g.*, *Bobbitt v. Milberg*, 801 F.3d 1066 (9th Cir. 2015) (relying on the instant case to find jurisdiction over appeal after plaintiffs' "voluntary dismissal of their individual claims"); Appellant Henson's Reply Br. at 1, *Henson v. Fid. Nat'l Fin., Inc.*, No. 14-56578 (9th Cir., dec. pending), *available at* 2015 WL 4537372 (invoking the instant case in

---

tacit approval of piecemeal litigation by plaintiffs seeking review of an adverse interlocutory order "has been rejected by other circuits." *Shannon v. Gen. Elec. Co.*, 186 F.3d 186, 193 (2d Cir. 1999). She recognized that § 1291's finality rule "may come into conflict" with the Second Circuit's approach to merger, which "would reward [a plaintiff] for dilatory and bad faith tactics." 186 F.3d at 192 (citations and quotations omitted). Nonetheless, the rule persists in that circuit.

support of jurisdiction after voluntary dismissal); Reply Br. of Plaintiff-Appellant, *Smith v. Microsoft Corp.*, No. 14-55807 (9th Cir. Mar. 30, 2015), ECF 25 at 28-33; Plaintiffs' Motion to Dismiss, *Strafford v. Eli Lilly & Co.*, No. 2:12-cv-09366-SVW-MAN (C.D. Cal. Sep. 30, 2015), ECF 199 at 4 (invoking the instant case as a justification for voluntary dismissal with prejudice).

The petition squarely presents the Court with an excellent opportunity to provide much needed clarity on this issue and forestall further gamesmanship. If this entrenched split is not resolved, future class actions will undoubtedly be concentrated in the Second and Ninth Circuits, as the rule adopted in those circuits favors plaintiffs so dramatically. The Court should seize this opportunity to establish a single, nationally uniform rule that a plaintiff may not use the tactic of a voluntary dismissal with prejudice to obtain appellate review of a district court's adverse, interlocutory class certification ruling.

III. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S HOLDING RAISES IMPORTANT, RECURRING QUESTIONS OF FEDERAL LAW

A. The Ninth Circuit's Expansive Reading of § 1291 is Inconsistent with the Proper Understanding of the Statute

Review is also warranted because the panel failed to explain how an interlocutory order effectively denying class certification can be suddenly transformed into a "final decision" within

the meaning of 28 U.S.C. § 1291 when the district court enters a stipulated order dismissing the case with prejudice? The only reasonable answer to that question must be "no." Simply put, "the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291." *Livesay*, 437 U.S. at 476.

The panel's contrary reading of 28 U.S.C. § 1291 is inconsistent with the proper understanding of that statute. As this Court recognized in *Livesay*, Congress adopted § 1291's "final decision" rule to ensure that controversies are not reviewed by appellate courts in a piecemeal fashion as issues arise. The decision below undermines § 1291 by effectively granting plaintiffs (but not defendants) an absolute right to immediate review of adverse class-certification orders.

Orders denying class certification do not merge into the judgment (and thus become unreviewable in an appeal under § 1291 from the final order of dismissal) when the final order of dismissal results from the plaintiffs' refusal to prosecute their claims. A contrary view would allow plaintiffs to use the dismissal order they procured as a vehicle to circumvent finality principles and secure piecemeal review of an interlocutory procedural ruling on class certification. By failing to address that issue, the panel implicitly adopted an expansive view of federal appellate jurisdiction that is inconsistent with longstanding notions of finality.

Permitting litigants to undertake piecemeal appeals whenever they disagree with adverse

decisions on class certification would unduly delay the resolution of district court litigation and needlessly burden the Courts of Appeals—precisely the outcome that § 1291 rejects.

B. The Ninth Circuit's Holding is Inconsistent with a Plain Reading of Rule 23(f)

The panel decision is also inconsistent with Rule 23(f), which grants both plaintiffs and defendants the right to *request* interlocutory review of class-certification orders but provides appeals courts unreviewable discretion to deny the request. By creating a means by which plaintiffs can essentially appeal class-certification orders as of right, the decision below undermines congressional direction that appeals courts' acceptance of such appeals be discretionary. *See* Advisory Committee Notes Accompanying 1998 Amendments to Rule 23 ("The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari. ... Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive.").

Rule 23(f) was promulgated in reaction to *Livesay* to give courts unfettered discretion to hear appeals of class-certification rulings, but the rulemakers quite pointedly did not exercise their authority under 28 U.S.C. § 2072(c) to define such rulings as "final" orders appealable as a matter of right under § 1291. The Ninth Circuit, by contrast, holds that a district court's adverse class

determination becomes an immediately appealable, final order when the district court dismisses the action *with prejudice*—at the plaintiff's invitation. Not even under the strictly construed collateral-order doctrine, which is a narrow exception to the final-judgment rule, do courts countenance such a significant departure from settled principles of finality. *See Livesay*, 437 U.S. at 468-70.

In this case, the Ninth Circuit granted respondents an appeal-as-of-right, even though a different panel of that court had previously rejected their Rule 23(f) request to appeal from the district court's order striking all class allegations from the complaint. The first appeals court panel's discretion under Rule 23(f) to reject an interlocutory request was therefore no longer unreviewable once a second appellate panel was permitted to second-guess that discretionary denial. As a result, plaintiffs can effectively will get *at least* two (rather than one) appeals from adverse class certification rulings, thereby multiplying their chances of encountering a sympathetic panel.

The Ninth Circuit's holding also effectively eliminates Rule 23(f)'s directive that petitions for interlocutory appeals be filed expeditiously. While 23(f) requires such petitions to be filed within 14 days after the adverse order on class determination, the decision below permits plaintiffs to delay their appeal until up to 30 days after entry of the stipulated dismissal with prejudice—a dismissal that may well be entered months after a class determination ruling, as was the case here.

Because the widening split of circuit authority on the question presented turns in part on the application and interpretation of a Federal Rule of Civil Procedure, this Court's review is especially needed. After all, the entire purpose of the Federal Rules of Civil Procedure is to provide a uniform and orderly process of adjudicating cases in the federal system. Indeed, it was the disparity of legal process among the states that served as the primary catalyst for the federal rules in the first place. *See Sayre v. The Musicland Grp., Inc.*, 850 F.2d 350, 354 (8th Cir. 1988) (noting that "the purpose of the Federal Rules of Civil Procedure" was "to provide uniform guidelines for all federal procedural matters"); Erwin Chemerinksy & Barry Friedman, *Federal Judicial Independence Symposium: The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 780 (1995) (stating that the "primary justification for adopting the Federal Rules of Civil Procedure was to increase the uniformity in procedural rules in federal courts across the country").

A persistent, ongoing circuit split that frustrates the uniform application of Rule 23(f) undermines the purpose of having a system of standardized procedural rules in the federal system. Because only this Court can announce a single uniform standard for the application of Rule 23(f), the petition should be granted.

CONCLUSION

For the foregoing reasons, *amici curiae* Washington Legal Foundation, National Association of Manufacturers, and International Association of Defense Counsel respectfully request that the Court grant the petition.

Respectfully submitted,

CORY L. ANDREWS
Counsel of Record
MARK S. CHENOWETH
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, D.C. 20036
(202) 599-0302
candrews@wlf.org

November 11, 2015